Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-467

~~FRED F. FRENCH INVESTING COMPANY, INC.~~, RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY, a partnership, and HARRY B. HELMSLEY,

Appellants,

against

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

JAMES F. CAHILL
ROBERT L. ELLIS
LOWELL D. WILLINGER
GOLDSTEIN SHAMES HYDE WIRTH BEZAHLER & CAHILL
Attorneys for Appellants Ramsgate Properties, Inc., North Assemblage Company, South Assemblage Company, and Harry B. Helmsley
655 Madison Avenue
New York, New York 10021
(212) 826-9550

Date: September 30, 1976

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Appendices:

The following documents are incorporated by reference to the jurisdictional statement of appellant Fred F. French Investing Company, Inc.:

A—Opinion of the Court of Appeals of the State of New York

B—Opinion of the Supreme Court, New York County

C—Order of the Court of Appeals entered May 4, 1976

D—Notice of Appeal of Appellant Fred F. French Investing Company, Inc.

E—Order of Court of Appeals dated September 8, 1976, denying motion for reargument

F—Zoning Resolution of the City of New York

G—Resolution of December 7, 1972 amending Zoning Map of the City of New York

H—Judgment dated April 25, 1974 of the Supreme Court, New York County

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In addition, the following document is included in the appendix filed herewith:

I—Notice of Appeal of Appellants Ramsgate Properties, Inc., North Assemblage Company, South Assemblage Company, and Harry B. Helmsley, filed July 23, 1976 with the New York County Supreme Court 8

TABLE OF AUTHORITIES

Cases Cited

Gillespie v. *U.S. Steel Corp.*, 379 U.S. 148 (1964) 7

Keystone Associates v. *State of New York*, 39 A.D.2d 176, 333 N.Y.S.2d 27 (3rd Dept. 1972), *aff'd*, 33 N.Y.2d 848, 352 N.Y.S.2d 194, 307 N.E.2d 254 (1973) 6

Kimball Laundry Co. v. *United States*, 338 U.S. 1 (1949) 5

United States v. *Dow*, 357 U.S. 17 (1958) 5

United States v. *General Motors Corp.*, 323 U.S. 373 (1945) 5, 6

United States Constitution Cited

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FRED F. FRENCH INVESTING COMPANY, INC., RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY, a partnership, and HARRY B. HELMSLEY,

Appellants,

against

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Preliminary Statement

Appellants Ramsgate Properties, Inc., North Assemblage Company, South Assemblage Company, and Harry B. Helmsley (the "Owners"), appeal from the final order of the Court of Appeals of the State of New York, entered on May 4, 1976, affirming the order of the Appellate Division, First Department dated February 4, 1975, which affirmed the judgment of the Supreme Court of the State of New York entered April 25, 1974, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

The Owners' cross-claim in this action challenged an amendment to the New York City Zoning Ordinance and Zoning Map which created "Special Park Districts" out of two parcels of property owned by them. The Owners were thereby prohibited from using these parcels for any purpose other than that which would be incidental to "passive recreational uses". The Owners in effect were deprived of the right to earn profits from the use of their property and were constrained to permit and support the use of their property for the benefit of the general public. The Court of Appeals of the State of New York has sustained this claim of the Owners by holding that this rezoning constituted an unconstitutional taking of their property, but that the Owners and Fred F. French Investing Co. Inc. ("French"), the mortgagee, were not entitled to monetary damages as for a taking in eminent domain because there had been no physical occupation of the Owners' property by the City. (Appendix A).

The attorneys for French are serving and filing concurrently herewith a jurisdictional statement in support of their appeal in this action, with which we are in agreement. We adopt and incorporate herein by reference the entire jurisdictional statement of French, as well as the documents contained in French's appendices, in support of the jurisdiction of the Court over this appeal as well as over French's appeal.

In addition to the questions raised by French's jurisdictional statement, which are incorporated by reference herein, one additional substantial question is raised by this appeal, which is discussed below.

Additional Question Presented

Did the enactment of the unconstitutional zoning amendment entitle the Owners to damages as for a temporary taking during the period the amendment was in effect?

It should be noted that this question arises only if the Court, after passing on the question raised by French's jurisdictional statement, should conclude, as did the courts below, that the zoning amendment, although invalid because it is confiscatory, did not give rise to a permanent taking of the Owners' property because there was no physical governmental occupation of that property.

The Court of Appeals did not rule on the question stating as follows:

> "With respect to damages caused by the unlawful zoning amendment the issue is not properly before the court. The owner never made such an unequivocal claim and still does not. Instead, it claims compensation for value appropriated as for an 'inverse' taking in eminent domain. The mortgagee and personal guarantor make parallel claims. That view of the invalid amendment is not adopted for the reasons discussed at length earlier. The City, on the other hand, seeks a declaration with respect to such damages but in the absence of allegation or proof that such damages lie, are claimed, or how they have been incurred, there can be no abstract declaration and therefore there is none." 39 N.Y.2d at 599, 385 N.Y.S.2d at 12.

It is submitted that the record will show that the Court of Appeals was incorrect; that this question was raised at every stage of the proceedings below, by the motion for summary judgment in the New York County Supreme Court, the motion for reargument to that court, and by the appeals to the Appellate Division and the Court of Appeals. In support of the motion for reargument to the New York County Supreme Court, the Owners demonstrated in detail the damages they had sustained as a result of the enactment of the zoning amendment, including (1) just compensation for the temporary appropriation of their property, (2) loss of the opportunity to con-

struct buildings on the parks due to rising construction and financing costs, (3) interest owned on French's mortgages, (4) real property taxes owed to New York City, and (5) loss of investment in acquiring and carrying these properties.

Moreover, as noted by the Court of Appeals, the City had sought a declaration that the Owners and French were not entitled to any damages, and in oral argument before the Court of Appeals, the City conceded that the Owners' pleadings were broad enough to encompass a claim for the temporary taking of the parks.

The Court of Appeals was therefore incorrect. The issue of a temporary appropriation had been presented to it and to the other courts below, and the question should have been decided.

Constitutional and Statutory Provisions Involved

Fifth and Fourteenth Amendments to the Constitution. New York City Zoning Resolution § 91-00 et al.

The Question Is Substantial

The Owners contend that if the Court of Appeals was correct in holding the zoning amendment to be invalid when enacted, the Owners' property was at least "taken" by New York City during the period of time between the enactment of the zoning amendment on December 7, 1972 and the entry of the order of the Court of Appeals on May 4, 1976, affirming the lower court orders voiding the amendment.* Such a temporary appropriation of the

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* Under CPLR § 5519(a)(2) and (e), enforcement of the judgment of the Supreme Court of the State of New York, County of New York, entered April 25, 1974, has at least been stayed pending the appeals of the City of New York to the Appellate Division and the Court of Appeals.

Owners' property without compensation by itself represented a taking of the Owners' property without just compensation and without due process of law, thereby violating the Fifth and Fourteenth Amendments.

This Court has ruled on the question of temporary takings of property previously in *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945), where it was held that the taking of part of a lease by the Government permitted consideration of the tenant's removal costs in the award of "just compensation" to be made to it. The Court stated in that case, 323 U.S. at 378:

> "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

See also *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), where the Court held that the amount of damages to be awarded as a result of a temporary taking of a laundry included an allowance for diminution in the value of the business due to the loss of its customers.

In *United States* v. *Dow*, 357 U.S. 17, 26 (1958), the Court stated that the abandonment of a condemnation proceeding by the Government could give rise to a claim of a temporary taking of property.

No decision of this Court to our knowledge, however, has yet been rendered which has declared that a *de facto* condemnation of property has or has not occurred during the

period an unconstitutional zoning ordinance was in effect. The question is novel because it arises only after the resolution of the equally novel question of whether such an unconstitutional enactment has effected a permanent taking of property. The latter question is substantial and important for municipal planning officials as well as for the citizen subjected to the zoning regulations of the municipality. It is submitted, however, that the issue of a permanent taking will not be fully resolved if the municipality and its citizens have not been apprised of the circumstances which will give rise to a temporary, as well as a permanent, taking resulting from the enactment of an unconstitutional zoning ordinance. If municipalities must plan their growth with the consent of their constituents they should know the full consequences of the enactment of such ordinances.

New York has recognized the right to compensation under analogous circumstances. See *Keystone Associates* v. *State of New York,* 39 A.D.2d 176, 333 N.Y.S.2d 27 (3rd Dept. 1972), *aff'd,* 33 N.Y.2d 848, 352 N.Y.S.2d 194, 307 N.E.2d 254 (1973), where the enactment of a statute, which had been declared unconstitutional because it deprived a lessee of the right to demolish the existing building and to construct a new building on the premises, was held to have effected a temporary appropriation of the property until the lessee was issued a demolition permit.

As indicated above in the instant case the Court of Appeals did not rule on the question of a temporary taking. However, this Court in the past has undertaken to decide what items of damage might be proved at trial resulting from a temporary taking where the question was deemed "fundamental to the further conduct of the case." *United States* v. *General Motors Corp., supra,* 323 U.S. at 377. Similarly, in the instant case, where, if the order of the Court of Appeals is affirmed, the only remaining issue is whether the Owners are entitled to damages as for a tem-

porary taking, it seems pointless to remand the case to the New York State courts for an additional four years of litigation when the issue can be decided at this time. See *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152-154 (1964).

Conclusion

For the reasons set forth above, the Court should note probable jurisdiction or in the alternative should grant certiorari to review the opinion and order of the Court of Appeals of the State of New York.

Dated: New York, New York
September 30, 1976

JAMES F. CAHILL
ROBERT L. ELLIS
LOWELL D. WILLINGER
GOLDSTEIN SHAMES HYDE WIRTH
BEZAHLER & CAHILL
Attorneys for Appellants
Ramsgate Properties, Inc.,
North Assemblage Company,
South Assemblage Company,
and Harry B. Helmsley

APPENDIX I

Filed With the Supreme Court of the State of New York on July 23, 1976.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 3611/73

FRED F. FRENCH INVESTING COMPANY, INC.,

Plaintiff-Appellant-Respondent,

—against—

THE CITY OF NEW YORK,

Defendant-Respondent,

RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY, a partnership, and HARRY B. HELMSLEY,

Defendants-Respondents-Appellants,

THE PEOPLE OF THE STATE OF NEW YORK,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ramsgate Properties, Inc., North Assemblage Company, South Assemblage Company and Harry B. Helmsley, the Defendants-Respondents-Appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Court

of Appeals of the State of New York entered May 4, 1976, affirming the order of the Appellate Division, First Department entered February 4, 1975, insofar as said orders affirmed so much of the judgment entered herein in the office of the Clerk of the County of New York on the 25th day of April, 1974, denying the motion of Defendants-Respondents-Appellants North Assemblage Company and South Assemblage Company for summary judgment on their cross-claim against Defendant-Respondent The City of New York declaring that the Zoning Amendment enacted by resolution of the Board of Estimate of the City of New York on December 7, 1972, establishing a "Special Park District" constituted a taking of the Tudor City park areas referred to in said resolution and directing The City of New York to pay to Defendants-Respondents-Appellants North Assemblage Company and South Assemblage Company the damages sustained as a result thereof, subject to the rights of the plaintiff thereto.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: New York, New York, July 23, 1976.

Robert L. Ellis, Esq.
Goldstein Shames Hyde Wirth
Bezahler & Cahill
Attorneys for Defendants-
Respondents-Appellants
Ramsgate Properties, Inc.,
North Assemblage Company,
South Assemblage Company
and Harry B. Helmsley
655 Madison Avenue
New York, New York 10021
(212) 826-9550

Appendix I.

To:

FINK, WEINBERGER, FREDMAN & CHARNEY, P.C.
Attorneys for Plaintiff-Appellant-Respondent Fred F. French Investing Company, Inc.
551 Fifth Avenue
New York, New York 10017

W. BERNARD RICHLAND, Esq.
Corporation Counsel
Attorney for Defendant-Respondent The City of New York
Municipal Building
New York, New York 10007

LOUIS J. LEFKOWITZ, Esq.
Attorney General of the State of New York
Attorney for Defendants The People of the State of New York
2 World Trade Center
New York, New York 10005

David W. Peck, Esq.
Sullivan & Cromwell, Esqs.
Attorneys for Tudor City Residents' Association
48 Wall Street
New York, New York 10005

Hon. Norman Goodman
Clerk of New York County
60 Centre Street
New York, New York 10007